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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH WHITNEY COMO, Defendant and Appellant.	C032966 (Super.Ct.No. 98F08091)

APPEAL from a judgment of the Superior Court of Sacramento County, Richard H. Gilmour, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Harry Joseph Colombo, Supervising Deputy Attorney General, and Charles Fennessey, Deputy Attorney General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 976(b) and 976.1, only the introduction, part III of the Discussion, and the Disposition are certified for publication.

Defendant Joseph Whitney Como appeals his convictions for possession of cocaine for sale (Health & Safety Code, § 11351.5) and possession of marijuana for sale (Health & Saf. Code, § 11359). On appeal, he contends there was insufficient evidence to support those convictions. He also complains the court erred in denying, without hearing, the second of his three *Marsden* motions. Finally, defendant contends the trial court committed various instructional errors.

In the published portion of our opinion, we discuss defendant's claim that CALJIC No. 1.00 improperly instructs a jury "in a way that prohibit[s] jury nullification." Because jurors are restricted to the determination of factual questions and may not themselves decide what the law is or what it should be, we reject that contention. In the unpublished portion of the opinion we reject defendant's remaining claims. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

At approximately 9:00 p.m. on September 3, 1998, Sacramento Sheriff's Deputies Parkhurst and Freeman were on patrol in a high drug-trafficking area, when they saw defendant hand an object to a child. The deputies stopped the pair and discovered the child had a large knife. They also learned defendant was on searchable probation, as a result of a prior conviction in 1998 for possession of a loaded handgun and transportation of cocaine.

The officers searched defendant's home, and Parkhurst found a box containing seven unused plastic baggies, six individually packaged baggies of marijuana, and six individually wrapped rocks of cocaine; all of the individually packaged drugs were contained in a larger plastic bag. The total weight of the cocaine was .93 grams, and the total weight of the marijuana was 8.16 grams.

Parkhurst did not find anything else such as scales, pagers or pay/owe sheets that would suggest defendant was selling controlled substances. But Parkhurst believed defendant possessed the drugs for sale rather than personal use, considering the manner in which the drugs were packaged, the discovery of $101 in cash and the area where defendant initially had been seen on the evening of September 3.

Karen Patterson, defendant's girlfriend, testified defendant has had an ongoing drug problem, using both marijuana and cocaine. An identification technician for the sheriff's department testified there were no latent prints on the bags containing the drugs. Defendant stipulated that the drugs were his.

The trial court accepted Detective Dennis Simms as an expert concerning possession of narcotics and possession of narcotics for sale. Simms was of the opinion the drugs were possessed for sale because of the manner in which the drugs were packaged. He testified that one who only uses drugs has no reason to keep the drugs in individual packaging. Simms had

been a police Officer for 24 years, 10 years of which he served as a narcotics investigator. He testified that, in his experience, he had never seen this many individually packaged drugs possessed only for personal use.

In support of his conclusions, Simms further testified the total amount of marijuana found had a street value of approximately $45. Individually packaged into the six bags, as found here, the marijuana would sell for approximately $10 to $15 per bag, or for a total of $90. Simms concluded it would not make sense for a user to have paid twice the amount of money for the same amount of drugs by buying small quantities packaged separately; thus, the only logical reason for the individual packaging was to make a profit on the drugs by reselling them.

Simms testified that it is unusual to find scales with dealers of rock cocaine. He admitted there are frequently other indicia of sales, such as cell phones, pagers, scanners, and pay/owe sheets. But, he noted the use of these items is a personal preference; some dealers use them and some do not. Simms also testified that finding additional unused packaging materials, such as the unused plastic baggies, was consistent with his conclusion that these drugs were possessed for sale. Finally, Simms testified defendant’s earlier possession of 17 individually wrapped rocks of cocaine, less than a year earlier, strengthened his conclusion that the drugs found on September 3 were possessed for sale.

On March 23, 1999, the district attorney filed an amended information charging defendant with possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and possession of marijuana for sale (Health & Saf. Code, § 11359). The information also alleged defendant had suffered a prior conviction for transportation of cocaine. (Health & Saf. Code, § 11352.)

On March 8, 1999, defendant's first *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118.) motion was heard and denied. On March 25, 1999, defendant made a second *Marsden* motion. The court inquired as to the basis for defendant's second motion, to which defendant replied he had done more research. The court indicated it would not consider any additional legal arguments but would consider further factual information. Defendant attempted to "refer" the court to a case number, and the court interrupted him, reiterating he would not hear any additional legal argument. "The question is if there is factually a new reason that something has transpired between the 8th and today's date, I'll hear it. If not, we're not going to have this hearing. [¶] You're looking down. I take it you have nothing further -- no further factual information to provide but you simply want another chance to present more legal authorities, and I am declining to hear those at this time." On April 21, 1999, defendant made his third *Marsden* motion. This motion was also heard and denied.

Jury trial commenced on April 22, 1999. On April 23, 1999, the jury found defendant guilty of possession of cocaine base for sale and possession of marijuana for sale, and found the prior conviction allegation true. Defendant was sentenced to the lower term of three years, and to a consecutive three-year term on the prior conviction enhancement.

DISCUSSION

I

Sufficiency of the Evidence of Possession for Sale

Defendant contends there was insufficient evidence supporting his convictions for possession for sale, arguing Detective Simms's opinion that the drugs were possessed for sale was based purely on speculation.

Defendant's contention relies primarily on *People v. Hunt* (1971) 4 Cal.3d 231 (*Hunt*), which he quotes, "Although the officer testified that in his opinion the [M]ethedrine was possessed for sale, his testimony in the circumstances of this case may not be held to be substantial evidence to support the conviction." (*Id.* at p. 231.)

The answer to defendant's claim lies in *Hunt* itself. In *Hunt,* the drug in question could be purchased legally by prescription. As *Hunt* recognized, a law enforcement officer may have experience with those who possess narcotics for their own use and those who possess narcotics for sale, but "there is no reason to believe he will have any substantial experience with

the numerous citizens who lawfully purchase . . . drugs for their own use as medicine for illness." (*Hunt, supra,* Cal.4th at 237-238.) There was no evidence suggesting the drugs involved in this case were lawfully purchased by prescription.

The *Hunt* court distinguished controlled substances such as marijuana and heroin from lawful prescription drugs, stating: "In cases involving possession of marijuana and heroin, it is settled that an officer with experience in the narcotics field may give his opinion that the narcotics are held for purposes of sale based upon matters such as quantity, packaging, and the normal use of an individual. On the basis of such testimony convictions of possession for purposes of sale have been upheld." (*Id.* at p. 237.) We have held previously, for purposes of this rule, that "rock cocaine is like marijuana or heroin." (*People v. Carter* (1997) 55 Cal.App.4th 1376, 1378.)

In this case, Detective Simms, an experienced narcotics officer, testified that, based on the quantity, packaging and normal individual use behavior, the drugs were possessed with the intent to sell. This testimony along with inferences the jury could have drawn from the balance of the evidence was sufficient to convict defendant of possession for sale.

II

The Marsden Motions

Defendant argues that the trial court erred in denying the second of his three *Marsden* motions without permitting him to present additional legal authority.

"*Marsden* holds that the trial court must afford the defendant an opportunity to express the specific reasons why he believes he is not being adequately represented by his current counsel when he makes a request for the appointment of new counsel." (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400.) However, where the record does not demonstrate counsel's incompetence, a failure to hold a pretrial *Marsden* hearing on defendant's request for new counsel may be remedied by a posttrial *Marsden* hearing. (*Id.*; see also *People v. Minor* (1980) 104 Cal.App.3d 194, 200.) A posttrial hearing remedies the error by allowing "[t]he question whether good cause existed for appointing new counsel [t]o be resolved at a hearing in which [defendant] can be given an opportunity to state his reasons for wanting new counsel appointed." (*People v. Minor, supra,* 104 Cal.App.3d at p. 200.)

In this case, there were three pretrial *Marsden* motions and two pretrial *Marsden* hearings. Defendant's sole complaint is the refusal of the court to grant him a hearing on the second of these three motions.

We note defendant contends, for the first time, in his reply brief, that he had additional facts to support his motion, as indicated by his reference to a "case number 9656644" which he claims was "clearly not a reference to legal precedent but rather, a reference to another trial level case." The record does not support this interpretation. In his third *Marsden* motion, defendant attempted to cite "Crannel" [*sic*] "versus

Bono, case number 965F44 (*sic).*" This reference suggests defendant's earlier reference to a case number was, in fact, an attempt to cite legal authority, not to refer to a case that had a factual bearing on his motion.

The trial court did not err in refusing to hear further argument on the law at the point of defendant's second *Marsden* motion. Even if this was error, we cannot conceive of a way in which defendant was prejudiced by it. In this case, a third pretrial *Marsden* hearing was conducted after the trial court refused to hear defendant's second *Marsden* motion. In the second pretrial *Marsden* hearing, defendant was permitted to present additional argument and was given an opportunity to state his reasons for wanting new counsel appointed. Thus, the record in this case "establishes . . . the defendant was given the judicial attention required under the holding in *Marsden*." (*People v. Maese* (1985) 168 Cal.App.3d 803, 810.) Defendant does not contend there was any error in the denial of his third *Marsden* motion. If a posttrial *Marsden* hearing can remedy the failure to hold a pretrial *Marsden* hearing, we fail to see how a subsequent pretrial hearing cannot also remedy such a failure.

III

CALJIC No. 1.00 and Jury Nullification

The trial court instructed the jury as follows, using CALJIC No. 1.00:

“Members of the Jury, you have heard all of the evidence and the arguments of the attorneys, and now it is my duty to instruct you on the law that applies to the case.

“The law requires that I read the instructions to you.

“You will have these instructions in written form in the jury room to refer to during your deliberations.

“You must base your decisions on the facts and the law.

“You have two duties to perform.

“First, you must determine what facts have been proved about the evidence in the trial and to [*sic*] not from any other source.

“A fact is something proved by the evidence or by a stipulation.

“A stipulation is an agreement between the attorneys regarding the facts.

“Second, you must apply the law that I state to you to the facts as you determine them, and in this way arrive at your verdict and any finding you are instructed to apply [*sic*] in your verdicts.

“You must accept and follow the law as I state it to you, regardless of whether you agree with the law.

“If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions and the law, you must follow my instructions.

"You must not be influenced by pity for or prejudice against a defendant.

"You must not be biased against a defendant because he he's [*sic*] been arrested with this offense, charged with a crime, or brought to trial.

"None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than innocent.

"You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

"Both the People and the defendant have a right to expect that you will consciously [*sic*] consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences."

Defendant objects to that portion of the instruction that says, "You must accept and follow the law as I state it to you regardless of whether you agree with the law." He argues that, by using that language, the trial court improperly instructed "the jury in a way that prohibited jury nullification."

Our Supreme Court said recently that, "'"it is a fundamental and historic precept of our judicial system that jurors are restricted solely to the determination of *factual* questions and are bound by the law as given them by the court. They are not allowed either to determine what the law is or what the law *should be*." [Citation.]'" *People v. Williams* (2001) 25

Cal.4th 441, 455 [juror who could not obey the law properly removed from jury].)

Defendant's attack on CALJIC 1.00 is without merit.

IV

CALJIC 1.00 and Due Process of Law

Defendant also contends the trial court violated his right to due process of law by instructing the jury "in terms of whether the defendant is 'more likely to be guilty than innocent.'" He refers to that portion of the court's instructions quoted above where the court said:

"You must not be biased against a defendant because he he's [*sic]* been arrested with this offense, charged with a crime, or brought to trial.

"None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than innocent.

We reject his argument for the reasons stated in *People v. Wade* (1995) 39 Cal.App.4th 1487, 1490-1491. Defendant's attempt to distinguish *Wade*, because an earlier version of CALJIC No. 2.90 was given, is unpersuasive. He does not explain why the addition of the words "to a moral certainty" in the earlier version of CALJIC No. 2.90 validated the concept set forth in CALJIC No. 1.00, but the deletion of the language in the current version renders CALJIC No. 1.00 an incorrect statement of the law. The connection escapes us. Defendant's claim of error cannot be sustained.

V

CALJIC No. 2.90

Finally, defendant makes a the standard contention challenging the reasonable doubt instruction in the 1994 version of CALJIC No. 2.90. Defendant's argument has previously, and conclusively, been rejected by this court and is rejected once again. (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287, and cases cited therein.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SIMS, Acting P.J.

CALLAHAN, J.